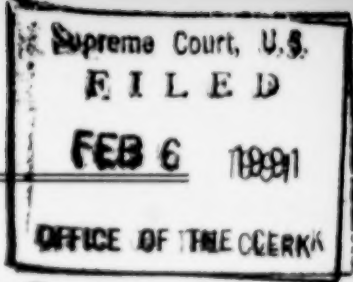


No. 90-5538



In The
Supreme Court of the United States

October Term, 1990

ZAKHAR MELKONYAN,

Petitioner,

v.

LOUIS W. SULLIVAN,
SECRETARY OF HEALTH AND HUMAN SERVICES,

Respondent.

On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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Counsel for Respondent

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Los Angeles, CA 90028
(213) 462-5540

Counsel for Petitioner

Petition For Certiorari Filed On August 23, 1990
Certiorari Granted January 7, 1991

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RELEVANT DOCKET ENTRIES

I. United States District Court for the Central District of California No. CV 84-4317-MRP (K)

July 8, 1984	Complaint Filed
September 17, 1984	Answer Filed
October 18, 1984	Plaintiff's Motion for Summary Judgment and Memorandum in Support
November 20, 1984	Defendant's Cross Motion for Summary Judgment and Memorandum in Support and in Opposition to Plaintiff's Motion for Summary Judgment
December 4, 1984	Plaintiff's Reply Brief on Summary Judgment
December 18, 1984	Defendant's Supplemental Memorandum Requesting Remand
December 27, 1984	Plaintiff's Objection to Defendant's Motion for Voluntary Remand
April 1, 1985	Plaintiff's Ex Parte Application to Remand
April 3, 1985	Order Granting Remand (Entered April 5, 1985)
May 18, 1986	Motion For Award of Attorney's Fees Under the Equal Access to Justice Act, and Memorandum in Support
July 10, 1986	Opposition to Plaintiff's Motion for Attorney's Fees
February 17, 1987	Judgment Denying Attorney's Fees (February 18, 1987)

March 17, 1987 Notice of Appeal Filed by Plaintiff
From Judgment of February 18, 1987

March 20, 1987 Motion to Proceed *In Forma Pauperis*
in the Ninth Circuit Granted.

II. United States Court of Appeals for the Ninth Circuit No. 87-5716

July 30, 1987 *Sua Sponte* Order to Show Cause
Why Appeal Should Not Be Dis-
missed For Lack of Jurisdiction

April 5, 1989 Stipulation of Parties in Response to
Order of March 22, 1989

January 31, 1990 Opinion Affirming Denial of Attor-
ney's Fees

May 29, 1990 Order Denying Rehearing and Sug-
gestion for Rehearing En Banc

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

ZAKHAR MELKONYAN,)	
Plaintiff,	)	CIVIL ACTION
	)	NO. 84-4317
vs.)	
MARGARET M. HECKLER,	)	COMPLAINT FOR
Secretary of Health and	)	SUPPLEMENTAL
Human Services,	)	SECURITY INCOME
Defendant.)	
)	

The plaintiff alleges as follows:

I

This is an action to review a final decision of the Secretary of Health and Human Services. This Court has jurisdiction of the action under 42 U.S.C. § 405(g), as amended.

II

The plaintiff, whose Social Security number is 562-61-9367, is a resident of the City of Los Angeles, State of California.

III

On May 28, 1982, plaintiff filed an application for supplemental security income with allegation of disability. The application was denied administratively initially and upon reconsideration, so that the plaintiff requested a hearing.

IV

A hearing was held on October 11, 1983, and the administrative law judge issued his decision on January 30, 1984, finding that the plaintiff was not disabled within the meaning of the Social Security Act.

V

The decision of the administrative law judge became the final decision of the Secretary, when it was affirmed by the Appeals Council on April 9, 1984; thus, plaintiff has exhausted all administrative remedies.

VI

The determinations of the administrative law judge and the Appeals Council are not supported by substantial evidence, are contrary to law, and constitute an abuse of discretion.

VII

The evidence of record, when fairly and accurately considered in its entirety, establishes that the plaintiff has been and is disabled within the meaning of the Social Security Act.

VIII

WHEREFORE, the plaintiff prays:

1. That the decision of the defendant be reviewed, reversed, and set aside.

2. That the plaintiff's claim for supplemental security income be allowed, or in the alternative, that the case be remanded for further proceedings.

3. That the defendant be ordered to make payment of the claim to the plaintiff in accordance with the law, plus the costs of this action.

4. That the Court award such other and further relief as it deems just and proper.

Dated: June 8, 1984

/s/ John Ohanian
John Ohanian Inc.
Attorney for the Plaintiff

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
NO. CV 84-4317-MRP(K)

(Caption Omitted In Printing)

DEFENDANT'S SUPPLEMENTAL MEMORANDUM

The Appeals Council has agreed, upon review to a voluntary remand for further administrative proceedings in this case. A Stipulation for Voluntary Remand was requested of plaintiff's attorney but he would not agree to so stipulate. Defendant hereby requests that the Court, in its discretion and pursuant to plaintiff's prayer for relief in his complaint, order this case be remanded pursuant to the Appeals Council decision to review for further administrative proceedings.

DATED: This 18th day of December, 1984.

Respectfully submitted,
ROBERT C. BONNER
United States Attorney
FREDERICK M. BROSILO, JR.
Assistant United States
Attorney
Chief, Civil Division

/s/ Evelyn M. Matteucci
EVELYN M. MATTEUCCI
Assistant United States
Attorney

Attorneys for Defendant

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
NO. CV 84 4317 MRP-K

(Caption Omitted In Printing)

PLAINTIFF'S OBJECTION TO DEFENDANT'S
MOTION FOR VOLUNTARY REMAND

When the plaintiff appealed to the Secretary's Appeals Council for review of Administrative Law Judge Harry C. Kessel's decision denying the plaintiff's disability, the Appeals Council advised that there was no basis under the regulations to grant review, (Tr. 2), and that if he wished to appeal, he should bring action in U.S. District Court.

Now that the plaintiff has followed the Secretary's advice and appealed to the District Court, the Secretary appears to have changed her position, in that she requests "voluntary remand for further administrative proceedings." The Secretary however does not admit error or indicate what will happen in the course of administrative proceedings. The Secretary's vague reference presents the real possibility of returning to Judge Kessel for another installment of error ridden and grossly defective proceedings. Plaintiff does not particularly welcome such a prospect.

Counsel for plaintiff believes that the record is complete, and that plaintiff has proved his disability based on his application of May 28, 1982. Counsel knows of nothing that remains to be done, except for the Secretary to order payment of benefits. Counsel sees no advantage in regressing to a lower level of review; our judicial system is structured for appeal to a higher level of review for a

dissatisfied claimant such as the plaintiff. Since the Secretary is not yet inclined to order payment of benefits to the plaintiff, he has no choice but to appeal to the Court to order payment of benefits.

The plaintiff therefore prays that the Court will reject the Secretary's request and grant the plaintiff's motion for summary judgement.

Dated: December 27, 1984.

Respectfully submitted,

John Ohanian Inc.

By: /s/ John Ohanian
John Ohanian
 Attorney for Plaintiff

UNITED STATES DISTRICT COURT
 FOR THE CENTRAL DISTRICT OF CALIFORNIA

NO. CV 84 4317 MRP(K)

(Caption Omitted In Printing)

EX PARTE APPLICATION
 TO REMAND: AND ORDER

On December 18, 1984, defendant filed a supplemental memorandum advising that the Appeals Council had agreed to a voluntary remand for further administrative proceedings in this case.

On December 27, 1984, plaintiff filed an objection to the defendant's motion for voluntary remand, with the expectation that the Magistrate would promptly issue his report and recommendation.

Plaintiff advises that his breathing problem has worsened and that his wife is seriously ill, so that he is confronted with considerable medical expenses and is anxious to have this matter concluded. In the event a favorable decision issued in this case, plaintiff would receive funds that could be used for medical expenses.

In view of the mentioned circumstances, counsel for plaintiff files this *ex parte* application for an order remanding this case to the defendant, with the belief that this will expedite resolution of the plaintiff's claim. Since plaintiff does not know when the Magistrate may issue his report and recommendation in this case, plaintiff asks the Magistrate to use his discretion and either issue his

report and recommendation, or remand the cause to the Secretary.

Dated: March 28, 1985

Respectfully submitted,

John Ohanian Inc.

By: /s/ John Ohanian
John Ohanian
Attorney for Plaintiff

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NO. CV 84-4317-MRP(K)

(Caption Omitted In Printing)

JUDGMENT

Defendant's motion to remand, concurred in by plaintiff, is granted. The matter is remanded to the Secretary for all further proceedings.

DATED: This 3 day of April, 1985.

/s/ Mariana R. Pfaelzer
MARIANA R. PFAELZER
United States District
Judge

DEPARTMENT OF HEALTH &
HUMAN SERVICES Social Security Administration

Office of Hearings and Appeals
PO Box 3300
Arlington VA 22203

MAY 07 1985

John Ohanian
Attorney at Law
548 S. Spring St., Suite 302
Los Angeles, CA 90013

Dear Mr. Ohanian:

Re: Zakhar Melkonian vs. Secretary of HHS
U.S.D.C. for the Central District of California
Civil Action Number CV-84-4317 MRP(K)

Enclosed is a copy of the Appeals Council's decision holding that the claimant qualifies as a disabled individual under title XVI of the Social Security Act. We have released the claim file and a copy of the enclosed decision to the Social Security Administration, Assistance Program Branch, Attention: Appellate Reversal, 100 Van Ness, 22nd Floor, San Francisco, CA 94102 which is responsible for authorizing supplemental security income payments. Any inquiries about payment should be directed to that office; however, before benefits may be paid a determination must be made as to whether the income and resource provisions of the Act are met. The component of the Social Security Administration Responsible for authorizing supplemental security income benefits will advise you and the claimant regarding these non-disability requirements and, if eligible, the amount and the month or months for which payment will be made.

Social Security Administration Regulations provide that an attorney who wishes to receive [sic] a fee for services performed in a proceeding before the Social Security Administration must file a petition. The enclosed snapout form petition is designed to elicit the required information, and instructions for completing the form appear on its reverse side.

When your services are concluded, please complete the enclosed petition form, furnish your client with the CLAIMANT'S COPY, retain the REPRESENTATIVE'S COPY for your records, and send the remaining copies directly to Attorney Fee Staff, Office of Hearing & Appeals, SSA, P. O. Box 3200, Arlington, Virginia 22203. To insure that the material is sent directly, please put "Do Not Open in the Mail Room" on the envelope.

Sincerely yours,

/s/ Harriet A. Simon
Harriet A. Simon
Member, Appeals Council

Enclosures

cc:
Zakhar Melkonian
3346 Griffith Park Blvd.
Los Angeles, CA 90027

DEPARTMENT OF
HEALTH AND HUMAN SERVICES
 SOCIAL SECURITY ADMINISTRATION
 OFFICE OF HEARINGS AND APPEALS

DECISION OF APPEALS COUNCIL

In the case of	Claim for
Zakhar Melkonian (Claimant)	) Supplemental Security) Income)) 562-61-9367) (Social Security Number)

This case is before the Appeals Council following remand from the United States District Court for the Central District of California (Civil Action Number CV-84-4317 MRP(K)). Therefore, the Appeals Council hereby vacates its denial of the claimant's request for review and the administrative law judge's decision of January 30, 1984.

In that decision, the administrative law judge found that the claimant [sic] did not have a severe impairment and that he was, therefore, not disabled on the basis of an application filed on May 28, 1982.

Subsequently, on May 30, 1984, the claimant filed a second application of supplemental security income. On the basis of evidence obtained in connection with the second application, the Disability Determination Service (DDS) of the state of California determined that the claimant is limited to medium work and that, considering his age, education, and relevant work experience, rule 203.10 of Table 3, Appendix 2, Subpart P, of Social Security Administration Regulations No. 4 directs a finding that the

claimant has been disabled since May 30, 1984. The determination that the claimant is limited to medium work was based on a report of pulmonary function studies that were conducted on April 25, 1984, and an opinion by a physician designated by the Secretary, dated June 7, 1984, that the pulmonary functions studies established a capacity for medium work. Those two medical reports are hereby entered into the record as Exhibits AC-1 and AC-2, respectively.

After consideration of all the evidence now of record, the Appeals Council concurs with the assessment of the claimant's functional capacity that was made by the physician designated by the Secretary. Therefore, the Council finds that at all pertinent times the claimant has been limited to the performance of medium work by his pulmonary impairment.

The claimant was born on May 10, 1925, and has been of "advanced age", as that term is defined in the Regulations, at all pertinent times.

The claimant attended school through the 6th grade in Syria and is illiterate and unable to communicate in English.

The only work that the claimant has performed in the relevant past was 2 hours per day as a laborer in a Bakery in the Soviet Union. That work was not substantial gainful activity, as defined in sections 416.974 of Social Security Administration Regulations No. 16, and cannot, therefore, be considered past relevant work. Thus, the Appeals Council finds that the claimant has no past relevant work.

The claimant has not engaged in substantial gainful activity since May 28, 1982. His impairment, emphysema, is severe but does not meet or equal in severity in impairment listed in Appendix 1, Subpart P, of Regulations No. 4. The claimant has no past relevant work.

The claimant is limited to medium work. Considering the claimant's age, education, and lack of relevant work, together with his residual functional capacity, rule 203.10 of Table 3, Subpart P, Regulations No. 4 directs a finding that the claimant has been disabled since May 28, 1982.

It is the decision of the Appeals Council that, based on the application filed on May 28, 1982, the claimant has been disabled under section 1614(a)(3) of the Social Security Act.

The component of the Social Security Administration responsible for authorizing supplemental security income payments will advise the claimant regarding the non-disability requirements and, if eligible, the amount and the month(s) for which payment will be made.

APPEALS COUNCIL

/s/ Harriet A. Simon
Harriet A. Simon, Member

/s/ John W. Wojchiechowski
John W. Wojchiechowski, Member

DATE: MAY 07 1985

DEFENDANT'S ATTACHMENT A

DEPARTMENT OF HEALTH &
HUMAN SERVICES

Office of the Secretary

Office of the General Counsel
Baltimore MD 21235

May 31, 1985

United States Attorney
1100 U.S. Courthouse
312 North Spring Street
Los Angeles, CA 90012

Dear Sir:

Re: Zakhar Melkonyan v. Secy. of HHS
C.D. of CA Civil No. 84 4317

(SSN: 562-61-9367)

(Our ref: GC:SS:BBesser)

The above case was remanded to the Secretary of Health and Human Services by court order.

- ✓ The Appeals Council has issued a decision favorable to the plaintiff. If appropriate, have the action discontinued or dismissed.
- The Appeals Council has issued a decision which holds that plaintiff is not entitled to Social Security benefits.
- The transcript of the record and our suggestion for answer will be forwarded as soon as prepared.
- Copies of the supplemental transcript or the record and our comments will be forwarded as soon as prepared.
- The Appeals Council has issued a partially favorable decision.

____ Plaintiff's attorney indicated his desire to continue the litigation.

____ We have been advised that the plaintiff does not wish to continue with the litigation. Please obtain an order of dismissal.

____ On ____ we requested that a remand be obtained. We have not yet been advised.

Sincerely yours,

Randolph W. Gaines
Deputy Assistant General Counsel
for Litigation

/s/ Betty Besser
Betty Besser
Legal Technician

✓ ____ Copy of A/C decision
____ Copy of pl's att'y ltr

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NO. CV 84-4317-MRP(K)

(Caption Omitted In Printing)

FINDINGS ON AN APPLICATION FOR
ATTORNEY'S FEES

These findings are submitted to the United States District Judge pursuant to the provisions of 28 U.S.C. § 636 and General order 194 of the United States District Court of the Central District of California.

On June 8, 1984, plaintiff by counsel filed this complaint seeking review of the decision of the Secretary denying social security benefits. 42 U.S.C. § 405(g). The Magistrate ordered further proceedings and on October 18, 1984, plaintiff filed a motion for summary judgment. Defendant filed its cross motion on November 20th. Plaintiff filed a reply brief on December 4th to which defendant filed a supplemental memorandum on December 18th indicating that the Secretary was granting a voluntary remand. On December 27, 1984, plaintiff filed objections to the motion for voluntary remand seeking a decision on the merits. On April 1, 1985, plaintiff withdrew his objections and the matter was subsequently remanded by order of the court. On May 7th, the Secretary issued a favorable decision. (Deft. Oppo. Exh. A.)

Plaintiff now seeks attorney's fees under the Equal Access to Justice Act. 28 U.S.C. § 2412(d).

A prerequisite to an award of fees and expenses under the Equal Access to Justice Act is a finding by the

court that the position of the United States was not substantially justified and that there are no special circumstances making such an award unjust. 28 U.S.C. § 2412(d)(1)(A). In addition, the application must be filed within 30 days of final judgment. § 2412(d)(1)(B).

The evidence of the favorable award before the court indicates that the plaintiff who had filed his first application for benefits on May 28, 1982 filed a second application on May 30, 1984 and "[o]n the basis of evidence obtained in connection with the second application, the Disability Determination Service ("DDS") of the State of California determined that the claimant is limited to medium work and that, . . . Rule 203.10 of Table 3, . . . directs a finding that the claimant has been disabled since May 30, 1984." The award goes on to state that the determination "was based on a report of pulmonary function studies which were conducted on April 25, 1984, and an opinion by a physician designated by the Secretary dated June 7, 1984," The Secretary then made a finding that the plaintiff had been disabled since May 26, 1982 "based on the application filed on May 26, 1982," (Defendant's Oppo., Exh. A.)

It appears from the record before the court that the Secretary reconsidered plaintiff's claim based upon new evidence.¹ Therefore this award is not a basis for finding that his original position was not "substantially justified."

¹ See Plaintiff's Memo in Support, filed October 18, 1984, Exh. A.

The Magistrate has reviewed the administrative record submitted to the Secretary in support of the original application and finds that it does not justify a finding that the original decision of the Secretary denying benefits was substantially unjustified. The medical reports in that record do not indicate disability as defined under the Act. (Admin. Rec. pp. 42-43, 92-96.)²

It is the conclusion of the Magistrate that it cannot be said from the evidence of record that the position of the government was not substantially justified.

IT IS THEREFORE RECOMMENDED that the Court enter an Order denying the request for fees.

DATED: This 12th day of February, 1987.

/s/ John R. Kronenberg
JOHN R. KRONENBERG
United States
Magistrate

² 20 C.F.R. 404.1520(c) was declared invalid by the Ninth Circuit on September 10, 1985. *Yuckert v. Secretary*, 774 F.2d 1364 (9th Cir. 1985). This was based on a finding that it was inconsistent with 42 U.S.C. 423(d)(2)(A) of the Social Security Act. A similar statute governs Supplemental Security Income (SSI), 42 U.S.C. 1382c(a)(3)(B). The Secretary's first decision applied 20 C.F.R. 416.920(c) which insofar as material here, is identical with 404.1520(c). The *Yuckert* decision came some 17 months after the final decision of the Secretary in the instant case (April 9, 1984). The Magistrate believes that the latter was substantially justified under a reasonable interpretation of the the regulations then in effect.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NO. CV 84-4317-MRP(K)

(Caption Omitted In Printing)

JUDGMENT DENYING ATTORNEY'S FEES

IT IS ADJUDGED that the request for attorney's fees
is denied.

DATED: This 17 day of February, 1987.

/s/ Mariana R. Pfaelzer
MARIANA R. PFAELZER
United States
District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ZAKHAR MELKONYAN,	)	No. 87-5716
)	
Plaintiff-Appellant,	)	DC#
	)	CV-84-4317-MRP
vs.	)	Central
	)	California
OTIS R. BOWEN,)	
Secretary of Health	)	ORDER
and Human Services,)	
	)	Filed
Defendant-Appellee.	)	July 30, 1987
_____)	

Appellant apparently failed to satisfy the requirements of 28 U.S.C. § 2412(d), when he filed an application for attorney fees over one year after judgment was rendered in the district court. Therefore, it is unclear whether the district court had jurisdiction to entertain appellant's motion for fees. Within 21 days of entry of this order, appellant shall voluntarily dismiss the appeal or show cause why it should not be dismissed for lack of jurisdiction. If appellant elects to respond, appellee may reply within 14 days of the filing of the response.

For the Court:

/s/ Meredith J. Watts
Meredith J. Watts
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 87-5716

(Caption Omitted In Printing)

STIPULATION OF PARTIES IN RESPONSE
TO ORDER OF MARCH 22, 1989

In response to the Court's Order of March 22, 1989, the parties hereby stipulate as follows:

1. Appellant, Mr. Melkonyan, was issued a payment of \$7,910.39 on September 17, 1985, pursuant to the Appeals Council's decision of May 7, 1985. Issuance of this payment is supported by a copy of the United States Treasury check in the above-stated amount, issued September 17, 1985, supplied by Mr. Melkonyan (copy attached);

2. The \$7,910.39 payment in September 1985 covered benefits due Mr. Melkonyan for the period of May 1982 through May 1984, as reflected in the attached computerized printout and the attached letter from Donald Mings of the Social Security Administration ("SSA"). The two separate payment columns in the computer printout reflect the Federal and State portions of the supplemental security income ("SSI") payments (\$3,816.71 in one column plus \$4,093.68 in the other column equals a total of \$7,910.39);

3. Neither party has been able to provide a copy of a letter or determination of the benefit amounts preceding or accompanying the September 1985 benefit payment. Mr. Melkonyan does not have a copy of a letter or decision and SSA has not been able to locate the claims

file. In any event, SSA has indicated to counsel for the Secretary that the file is unlikely to contain a letter or decision, because the letter advising claimant of the payment would have been computer-generated and SSA likely would not have retained a hard copy of the letter in the file;

4. Mr. Melkonyan has provided a copy of an August 9, 1984 letter (and two subsequent letters of November 26, 1984 and June 11, 1985) he received informing him of the amount of benefits to be paid for the period subsequent to May 1984 on the basis of an SSI application filed on May 30, 1984, while the SSI application of May 28, 1982 at issue in the instant case was being litigated on the merits in the District Court (copies attached). Although these letters are unrelated to the award of benefits for the period previous to May 30, 1984 covered by the Appeals Council's decision of May 7, 1985, the letters indicate the type of information that would have been provided Mr. Melkonyan in a letter at or about the time of the September 1985 payment, except for the explanation of Mr. Melkonyan's appeal rights provided on the reverse side of the letters (as indicated on the front of the attached letters);

5. Mr. Melkonyan sought no further administrative or judicial review in connection with the amount of

benefits determined in September 1985 pursuant to the Appeals Council's decision of May 7, 1985.

Respectfully submitted,

Dated: April 3, 1988

/s/ Michael R. Power
MICHAEL R. POWER
Attorney for Appellee

Dated: April 4, 1988

/s/ John Ohanian
JOHN OHANIAN
Attorney for Appellant

United States Court of Appeals,
Ninth Circuit.

Zakhar MELKONYAN,
Plaintiff-Appellant,

v.

Margaret M. HECKLER, Secretary of HHS,
Defendant-Appellee.

No. 87-5716.

Argued and Submitted Jan. 10, 1989.

Submission Withdrawn March 22, 1989.

Resubmitted April 5, 1989.

Decided Jan. 31, 1990.

Before WALLACE, CANBY and TROTT, Circuit
Judges.

ORDER

The opinion filed in the above case on June 30, 1989,
is withdrawn.

OPINION

WALLACE, Circuit Judge:

Melkonyan appeals from the district court's judgment denying his application for attorney's fees and costs under the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412. Melkonyan challenges the court's conclusion that the position taken by the Secretary of Health & Human Services (Secretary) was "substantially justified." Because Melkonyan's EAJA application was not filed within the

jurisdictional time limit, we vacate the judgment and remand for dismissal by the district court.

I

On May 28, 1982, Melkonyan filed an application for supplemental security income (SSI) disability benefits under Title XVI of the Social Security Act (Act). 42 U.S.C. §§ 1381 *et seq.* The application was denied. After a hearing, an administrative law judge (ALJ) again denied the application, determining that Melkonyan was not disabled within the meaning of the Act. The Appeals Council affirmed the ALJ's decision on April 9, 1984. On June 8, 1984, Melkonyan filed a complaint in district court seeking review pursuant to 42 U.S.C. § 1383(c)(3), which incorporates the judicial review provisions of 42 U.S.C. § 405(g).

Meanwhile, on May 30, 1984, Melkonyan filed a new application for SSI disability benefits supported by new evidence of disability. He learned on August 9, 1984, that this application was approved.

On October 18, 1984, Melkonyan filed a motion in district court for summary judgment, which included the new evidence of his disability. The Secretary offered and Melkonyan refused a stipulated remand for further administrative proceedings. The Secretary then moved for a court-ordered remand pursuant to 42 U.S.C. § 405(g), which Melkonyan initially opposed and then supported. On April 5, 1985, the district court entered its order to remand.

On May 7, 1985, the Appeals Council vacated the ALJ's decision rejecting Melkonyan's original application, and determined that he was disabled as of the date of his original application. The determination of Melkonyan's benefits occurred on September 11, and he was paid on September 17, 1985. Melkonyan sought no further administrative or judicial review in connection with the award of benefits.

On May 19, 1986, Melkonyan filed a motion in district court for attorneys' fees and costs in a civil action against the United States pursuant to the EAJA, 28 U.S.C. § 2412(d). The Secretary opposed on the grounds that Melkonyan was not a "prevailing party," and that even if he were, the government's position had been "substantially justified." The court denied Melkonyan's request, holding that the government's position had been substantially justified. This appeal followed.

II

28 U.S.C. § 2412(d)(1)(A) provides that a party prevailing in a suit against the United States or one of its agencies should receive attorneys' fees, costs, and other expenses incurred in the civil action "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." *Id.* A party requesting such an award must submit an application to the court "within thirty days of final judgment in the action." 28 U.S.C. § 2412(d)(1)(B). The 30-day time limit is jurisdictional. See *Papazian v. Bowen*, 856 F.2d 1455, 1455-56 (9th Cir.1988) (*Papazian*); *Barry v. Bowen*, 825 F.2d 1324, 1327-29 (9th

Cir.1987); see also *MacDonald Miller Co. v. NLRB*, 856 F.2d 1423, 1424 (9th Cir.1988) (so construing 30-day time limit in another section of the EAJA); *Columbia Manufacturing Corp. v. NLRB*, 715 F.2d 1409, 1410 (9th Cir.1983) (same). Final judgment in this context means "a judgment that is final and not appealable, and includes an order of settlement." 28 U.S.C. § 2412(d)(2)(G). This definition applies to Melkonyan's case, which was pending when the definition was revised by amendments to the EAJA on August 5, 1985. Equal Access to Justice Act, Extension and Amendment, Pub.L. No. 99-80 § 7(a), 99 Stat. 183, 186 (1985) (EAJA Extension Act); see *McQuiston v. Marsh*, 790 F.2d 798, 800 (9th Cir.1986) (*McQuiston II*).

We must first consider the threshold jurisdictional question whether Melkonyan submitted his request within 30 days of final judgment, as defined by the EAJA Extension Act. The problem lies in identifying the relevant "judgment that is final and not appealable." 28 U.S.C. § 2412(d)(2)(G). We interpret the EAJA de novo. *Kali v. Bowen*, 854 F.2d 329, 331 (9th Cir.1988).

The district court order remanding to the agency for further administrative proceedings was not a final judgment for purposes of 28 U.S.C. § 2412(d)(1)(B). *Papazian*, 856 F.2d at 1455-56. There, an ALJ rejected Papazian's application for disability benefits under Title II of the Social Security Act on the grounds that Papazian was not disabled. *Id.* at 1455. The Appeals Council affirmed by denying review. *Id.* Papazian sought judicial review, but while his complaint was pending in district court, the parties agreed to a court order remanding for "further administrative proceedings." *Id.* at 1455-56. On remand, the Appeals Council found Papazian disabled and

awarded him benefits. The district court concluded that Papazian's subsequent petition for fees was untimely because the 30 days since the remand order had expired. *Id.*

We reversed because neither the parties nor the district court intended the remand to end the litigation, particularly in light of the reference to "further administrative proceedings." *Id.* at 1456. Similarly, both parties here expected further administrative proceedings to follow the remand. Thus, the district court order of remand was not a "judgment that is final and not appealable" and therefore did not trigger the 30-day period. See also *Swenson v. Heckler*, 801 F.2d 1079, 1080 (9th Cir.1986) (holding that claimant who obtains order of remand not entitled to EAJA fees, but basing decision on "prevailing party" rather than "finality"); *Singleton v. Bowen*, 841 F.2d 710, 711-12 (7th Cir.1988) (same).

In *Papazian*, after the Appeals Council awarded the claimant benefits, the district court adopted the decision and entered it as its own judgment. 856 F.2d at 1455. We looked to this district court judgment, rather than the Appeals Council's award of benefits on remand, in determining what constituted the final judgment for purposes of section 2412(d)(1)(B). *Id.* at 1455-56. Here, however, the district court entered no such judgment. We are faced with a problem not confronted by us in *Papazian*: If the remand order lacks finality, and there is no subsequent district court order, what event triggers the 30-day time limit prescribed by 28 U.S.C. § 2412(d)(1)(B)? We are forced to resolve this problem because our jurisdiction rests on its outcome.

Pursuant to 28 U.S.C. § 2412(d)(1)(B), the 30-day time limit is triggered by a "final judgment in the action." Section 2412(d)(2)(G) goes on to define a "final judgment" as "a judgment that is final and not appealable." On May 7, 1985, the Appeals Council vacated the ALJ's original decision rejecting Melkonyan's application, and determined that he was disabled as of the disability onset date that he alleged in his original application. We must determine whether this decision constituted a "final judgment" within the meaning of section 2412(d)(2)(G) and triggered the 30-day period for seeking EAJA fees under section 2412(d)(1)(B).

As we held in *McQuiston II*, the 30-day period does not begin to run until the time to appeal expires. 790 F.2d at 800. Ordinarily, this means that the 30-day period will start 65 days after the date on the notice of the Secretary's determination of eligibility for benefits. See 20 C.F.R. §§ 416.1401, 1481, 1483 (1988) (60 days to seek district court review of the Appeals Council decision, plus 5 days between date of notice and date notice deemed received). However, where, as here, the Secretary determines that the claimant was disabled as of the disability onset date that the claimant alleged in his original application, the 30-day period begins to run immediately upon the decision of the Appeals Council. This rule is appropriate because the Secretary's decision is "not appealable" by either the claimant or the Secretary. We do not need to address the question of when the Secretary's remand decision which is either partially favorable or unfavorable to a claimant becomes a final judgment.

The decision by the Appeals Council constitutes the final decision of the Secretary. *Sullivan v. Hudson*, ___ U.S.

___, 109 S.Ct. 2248, 2252, 104 L.Ed.2d 941 (1989). Section 405(g) entitles only an "individual" to appeal the Secretary's decision. *Jones v. Califano*, 576 F.2d 12, 18 (2d Cir.1978). Thus, the Secretary would not have standing or reason to complain of his own final decision. Likewise, if a claimant wholly prevails on his claim, he would have no reason to appeal that decision.

We, therefore, conclude that the "final judgment" in Melkonyan's action was rendered on May 7, 1985. But Melkonyan did not move for EAJA fees until more than one year after this "final judgment." The district court therefore lacked subject matter jurisdiction to entertain his application. 28 U.S.C. § 2412(d)(1)(B); *Papazian*, 856 F.2d at 1455-46 [sic]. Accordingly, we do not reach the question whether the government's position was substantially justified. Instead, we vacate and remand to the district court for dismissal.

In making our decision, we are confronted with what appears to be a different approach to this problem by a sister circuit. In *Guthrie v. Schweiker*, 718 F.2d 104 (4th Cir.1983) (*Guthrie*), the Fourth Circuit ordered the district court to direct the Secretary to make the filing 42 U.S.C. § 405(g) describes. *Id.* at 106. After this filing, the Fourth Circuit directed the district court to enter a final judgment so that the section 2412(d)(1)(B) 30-day period would begin. *Id.*; accord *Brown v. Secretary of Health & Human Services*, 747 F.2d 878, 884-85 (3d Cir.1984); see also H.R.Rep. No. 120, 99th Cong., 1st Sess., pt. 1 at 19-20 (1985), reprinted in 2 1985 U.S.Code Cong. & Admin.News 132, 148 (legislative history of 1985 amendments to EAJA stating that neither remand to agency nor agency decision

after remand constitutes final judgment; approving *Guthrie* and *Brown* holdings that district court order after Secretary makes required post-remand filing constitutes "final judgment" triggering 30-day period).

Guthrie's approach is troublesome. While section 405(g) requires the Secretary to file the new decision and findings after remand, it does not confer upon the district court any independent power to review the post-remand filing. The agency's decision may be reviewed by the district court only if a claimant appeals within the 60-day time limit. See 42 U.S.C. § 405(g); 20 C.F.R. §§ 416.1401, 1481 (1988). The Secretary's post-remand decision is reviewable only to the extent that the agency's original decision and findings were reviewable. 42 U.S.C. § 405(g). Unless the ordinary procedural requirements for judicial review of an agency decision are met, we are at a loss to find a basis for the district court to enter any order or judgment affirming, modifying, reversing or remanding the Secretary's post-remand filing. Nor do we see any advantage to such an approach. Established procedures already allow a claimant dissatisfied with the Secretary's decision on remand to secure judicial review. 20 C.F.R. §§ 416.1401, 1481 (1988). In such a case, the section 405(g) requirement that the Secretary furnish the findings, decision, and record supplements the claimant's appeal. If the Secretary's decision is wholly in favor of the claimant, we are hard pressed to see a need for the overburdened district courts to deploy scarce judicial resources in a sua sponte "affirmation" of uncontested eligibility decisions.

More importantly, *Guthrie* was decided before the 1985 EAJA amendment which effectively redefined "final

judgment" as "a judgment that is final and not appealable." See 28 U.S.C. § 2412(d)(2)(G); *McQuiston II*, 790 F.2d at 800. *Guthrie* explicitly relied on the "common usage" definition of final judgment articulated in *McQuiston v. Marsh*, 707 F.2d 1082, 1085 (9th Cir.1983), which *McQuiston II* held had been overruled by the 1985 amendment. *McQuiston II*, 790 F.2d at 800; *Guthrie*, 718 F.2d at 106. The Fourth Circuit assumed that final judgment meant the type of judgment provided under Fed.R.Civ.P. 54, a judgment only a court could enter. 718 F.2d at 106. Thus, only a court's judgment could be a final judgment triggering the 30-day period to submit an application for EAJA fees. *Id.* The revised statute, aside from its use of the term "judgment," gives us no reason to think that this is so. See 28 U.S.C. §§ 2412(d)(1)(B) & (d)(2)(G). It does not appear, therefore, that we should interpret "judgment" in this context as requiring a judgment by a court. For these reasons, we do not remand this case ordering the district court to enter a final judgment with the thought that the section 2412(d)(1)(B) 30-day period would begin.

Our approach not only sets definite limits for purposes of finality, but it also benefits individuals seeking EAJA awards under section 2412 in similar circumstances. Rather than wait for the Secretary to make a post-remand filing and wait for that filing to be affirmed by the district court, such individuals may seek EAJA awards as soon as the agency's action on remand becomes a "final judgment" under section 2412(d)(2)(G).

We therefore vacate the judgment of the district court and remand this case for dismissal for lack of subject matter jurisdiction.

VACATED AND REMANDED WITH INSTRUCTIONS TO DISMISS.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ZAKHAR MELKONYAN,	)	No. 87-5716
)	
Plaintiff-Appellant,	)	D.C. No.
	)	CV-84-4317-MRP
-vs-)	
	)	ORDER
MARGARET M. HECKLER,	)	DENYING
SECRETARY OF HHS,	)	REHEARING
)	
Defendant-Appellee.	)	Filed
	)	May 29, 1990

Appeal from the United States District Court
for the Central District of California

Before: WALLACE, CANBY, and TROTT,
Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

SUPREME COURT OF THE UNITED STATES

No. 90-5538

Zakhar Melkonyan,

Petitioner

v.

Louis W. Sullivan, Secretary of Health
and Human Services

ON PETITION FOR WRIT OF CERTIORARI to the United
States Court of Appeals for the Ninth Circuit.

ON CONSIDERATION of the motion for leave to proceed
herein in forma pauperis and of the petition for writ of
certiorari, it is ordered by this Court that the motion to
proceed in forma pauperis be, and the same is hereby,
granted; and that the petition for writ of certiorari be, and
the same is hereby, granted.
